IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 572

MINNIE KRANTMAN,

Petitioner,

vs.

LIBERTY LOAN CORPORATION, a Delaware Corporation, I. H. LEVY, D. J. HARRIS, DAVID B. LICHTENSTEIN, LYLE S. WOODCOCK and DAVID S. NERAD,

Respondents.

BRIEF OF RESPONDENT, I. H. LEVY IN OPPOSITION

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BRIEF OF RESPONDENT, I. H. LEVY IN OPPOSITION

I. H. Levy concurs in and adopts the brief filed in this Court by his co-respondents.

This brief is directed only to those issues which concern I. H. Levy individually and personally.

QUESTIONS PRESENTED AS TO RESPONDENT I. H. LEVY

1. Whether the petitioner, who first became a shareholder in respondent, Liberty Loan Corporation, through the purchase of its shares approximately 60 days after I. H. Levy sold his B shares therein can maintain a derivative action attacking such sale.

2. Assuming petitioner may maintain such action, whether she is entitled to have this Court set aside the findings of fact made by the Trial Court sitting without a jury, which she did not attack in the Court of Appeals as unsupported by the evidence, and which that Court left undisturbed.

3. Whether the Court of Appeals refrained from considering the law relating to the alleged fiduciary obligation of respondent I. H. Levy in selling his said B shares and by so refraining caused such a gross miscarriage of justice as to call for this Court's power of supervision.

STATEMENT OF THE CASE

I. H. Levy adopts the restatement of the case in the brief filed in this Court by his co-respondents, with the following additions:

This is a stockholder's derivative suit brought by petitioner, who purchased 25 Class A shares of respondent Liberty Loan Corporation, (hereinafter referred to as Liberty), on September 16, 1954 (Pet. 6, Apdx. 2a).* Liberty issued its certificate to petitioner for said shares on October 18, 1954 and this suit was instituted on October 20, 1954. The alleged purpose of the suit was to secure on behalf of Liberty equitable relief from the frauds alleged to have been perpetrated against it and its Class A shareholders by the individual defendants.

A claim was first asserted against I. H. Levy personally in an amendment to complaint and supplemental complaint filed September 22, 1955, (Pet. Apdx. 2a) in which it was prayed that Liberty recover of him any sums paid to him, his family and associates as part of the purchase price of 7,241 shares of Class B stock; also that Liberty recover from him that part of the purchase price of said shares

* Reference is to the petition filed herein and the appendix thereto.

which "represents the sale of the control of the corporation" (R. 134).

On July 19, 1954, Key Finance Company, pursuant to an option previously given, purchased unconditionally from I. H. Levy and members of his family, and became the owner of said 7,241 shares of Class B Common Stock without any commitment or agreement by any one that the Class B Common Stock would be reclassified or be exchanged for any other stock of Liberty. The aggregate purchase price was $1,700,000 (Fdg. 14). The negotiations leading up to the purchase and its subsequent consummation were at arm's length and not as a part of any scheme (Fdg. 12).

The case was tried in the District Court without a jury. After plaintiff had completed the presentation of her evidence the District Court allowed defendants' motion to dismiss in accordance with Rule 41(b) of the Rules of Civil Procedure holding that upon the facts and the law plaintiff had shown no right to relief. A final decree was entered dismissing the action for want of equity. The Court delivered an oral opinion which stated findings and conclusions (Aplt. Apdx. 37-39). Also, after a hearing upon proposed findings and conclusions and upon objection thereto, the Court stated formal findings and conclusions as required by Rule 41(b) (Aplt. Apdx. 41-59).

ARGUMENT

I.

Since petitioner purchased her stock approximately 60 days after the sale of said 7,241 shares of Class B stock was consummated, she has no right to attack the sale.

Petitioner's attack upon the action of the Court below insofar as I. H. Levy is concerned relates only to the sale by him and his family of said 7,241 shares of Class B Stock. The 5th question petitioner asserts as presented for review is "Did the Court of Appeals correctly refrain from considering the law relating to the fiduciary obligation of defendant, I. H. Levy" with respect to said sale (Pet. 4). In petitioner's argument it is stated "In addition the fiduciary obligation of Levy in receiving for himself and his family $1,700,000 for Class B Stock having a book value of $121,024 was completely ignored by the Court of Appeals. . . . It is respectfully suggested that some consideration should have been given by the Court of Appeals to the law applicable to this transaction" (Pet. 19).

The undisputed evidence is that plaintiff purchased 25 shares of Liberty class A stock by having her lawyer place an order therefor with a broker on September 16, 1954 (Fdg. 2).

The sale of the 7,241 shares of "B" stock was provided for in option agreements dated July 8, 1954, by which the sellers became irrevocably committed to sell in the event the options were exercised. The options were in fact exercised, the consideration paid and the stock irrevocably delivered to the purchaser July 19, 1954 (Fdg. 14).

Rule 23(b), Federal Rules of Civil Procedure, provides that:

> "In an action brought to enforce a secondary right on the part of one or more shareholders * * * the com-

> plaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law * * *."

In accord with this rule it has been held repeatedly that a stockholder suing in a derivative capacity cannot maintain an action attacking a transaction which occurred before he purchased his stock: *Weinhaus* v. *Gale*, 237 F. 2d, 197 (C.A. 7), *Henis* v. *Compania Agricola des Guatemala*, 210 F. 2d 950 (C.A. 3), *Pergament* v. *Frazer*, 93 F. Supp. 9, 12-13, *Levitan* v. *Stout*, 97 F. Supp. 105, 118.

II.

Petitioner should not be permitted to go behind the findings of fact and contrary thereto postulate the violation of fiduciary relationships which the Court found did not occur.

As above noted petitioner's complaint with respect to I. H. Levy is limited to the sale by him and his family of 7,241 Class B shares of Liberty with a book value of $121,024 for $1,700,000 (Pet. 4, 19).* Pursuant to rule 41(b) Federal Rules of Civil Procedure the Court made findings which under rule 52 "shall not be set aside unless clearly erroneous."

In the opening paragraph of its opinion the Court of Appeals said (Pet. 1(a)):

> "There is absent from this appeal any assertion that the findings of fact made by the District Judge sitting without a jury are unsupported by the evidence. * * * After our study of this record and the parties' briefs, we leave those findings undisturbed".

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* Petitioner does not here mention the claim made below that the retention of I. H. Levy and 2 members of his family in the employment of Liberty after the sale of said "B" shares was a part of the consideration received for said shares. The Trial Court's findings (40-42) uncontradicted by any evidence disposed of this claim.

In *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, this Court said (275):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact findings cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Petitioner has not attempted to point out a single error in the findings of fact.

Relative to the value of the class B stock the Trial Court found, on undisputed evidence produced by the plaintiff (Fdg. 7):

> "On several occasions prior to July, 1954, I. H. Levy had negotiations with various companies concerning the disposition by him and members of his family of their Class B shares in Liberty. In 1951 Family Finance Corporation was willing to pay $1,800,000 for the shares of Class B stock. In the latter part of 1950 and the early part of 1951 American Investment Company was willing to pay $1,700,000 for said shares of Class B stock. In 1953 American Investment Company again wished to purchase said Class B shares and offered $1,500,000, which amount was not acceptable to said I. H. Levy. Commencing in March, 1954, negotiations were had between I. H. Levy and certain directors of Liberty with representatives of Seaboard Finance Company, looking toward an exchange of stock of the two corporations under which the Class B shares of Liberty would be exchanged for 60,000 shares of a preferred stock of Seaboard, convertible on a share for share basis into Seaboard common stock within one year. Based upon the then market value of the Seaboard common stock, this would have produced something over $1,500,000 for the holders of the Class B common stock of Liberty but without any income tax being payable on the transaction by the holders of the Class B common stock. These negotiations and offers tended to establish a market price for the Class B common stock in the range from $1,500,000 to $1,800,000."

Relative to the sale of the Class B stock the Trial Court likewise found, (Fdg. 14):

> "On July 8, 1954, options to purchase an aggregate of 7,241 shares of Class B common stock were granted to said Key Finance Company by I. H. Levy and his wife, Louis Strilky (his brother-in-law), Harriet Levy (his daughter), and H. H. Levy (his brother) and members of the latter's family. These options related only to an outright purchase, *without any contingency, condition or limitation*, from I. H. Levy and the other grantors of said options of the 7,241 shares of Class B common stock of Liberty, for the aggregate price of $1,700,000. On July 19, 1954, Key Finance Company exercised said options and purchased unconditionally and became owner of said 7,241 shares of Class B common stock *without any commitment or agreement by anyone that the Class B common stock would be reclassified or exchanged for any other stock of Liberty.*" (Emphasis supplied.)

Referring to the negotiations leading up to the execution of the options and the sale pursuant thereto the Court also found (Fdg. 12):

> "These negotiations were carried on and the subsequent purchase was consummated at arm's length and not as a part of any scheme between Lichtenstein and I. H. Levy, as charged in the Complaint or otherwise."

Thus, on the Findings of Fact the sale of the Class B shares by I. H. Levy and his family was at a price within the range of the Market, was not a part of any scheme and was without any agreement respecting reclassification or exchange of the same. It was an arm's length transaction without any contingencies, conditions or limitations and there was no evidence of fraud committed against Liberty or its Class A shareholders. The sale in no way enriched Levy at Liberty's expense or injured Liberty or its shareholders.

On the basis of such findings none of the cases cited by

petitioner *in support of her suggestion* "that some consideration should have been given by the Court of Appeals to the law applicable to this transaction" (Pet. 19) indicate that the Court of Appeals did not give full consideration to the applicable law.

All of those cases involved situations in which at the time the sale was made the sellers knew or by exercise of reasonable diligence should have known that the purchasers intended to deal with the *corporate assets* in such a way as to dissipate them or to divert them to their own benefit. These cases are generally referred to as falling within the "looting" doctrine. In the instant case neither the sale of the "B" shares to Key Finance Company nor the subsequent recapitalization of Liberty in any way dissipated or diverted the *corporate assets* from Liberty. In fact, the record evidence amply demonstrates to the contrary that since the sale the assets of the corporation and its business have both been substantially expanded.

Perlman v. *Feldmann*, 219 Fed. (2d) 173 (CA 2, 1955) strongly relied upon by the plaintiff in the District Court and in the Court of Appeals is clearly distinguishable from the instant case and falls within the scope of the "looting" doctrine referred to above. That case was a derivative action by minority stockholders of a steel corporation which sought an accounting for illegal gains which the defendants enjoyed upon a sale of the controlling interest in the corporation. The sale was made during a period of steel shortage to a group which paid a bonus over and above the market price to the controlling interest in order to assure themselves of a supply of steel.

The court in the *Feldmann* case recognized that the majority stockholder becomes liable to the minority stockholders and to the corporation only when and to the extent that he has participated in or aided a diversion of or injury

to the corporate assets. Beginning at page 178, the court said:

> "We do not mean to suggest that a majority stockholder cannot dispose of his controlling block of stock to outsiders without having to account to this corporation for profits or even never do this with impunity when the buyer is an interested customer, actual or potential; for the corporation's product. But when the sale necessarily results in a sacrifice of this element of corporate good will and consequent unusual profit to the fiduciary who has caused the sacrifice, he should account for his gains. So in a time of market shortage, where a call on a corporation's product commands an unusually large premium, in one form or another, we think it sound law that a fiduciary may not appropriate to himself the value of this premium."

The *Feldmann* case is further distinguishable by reason of the fact that the majority shares were sold to the purchasers at a considerable advance over and above the market price, a situation which is not present in this case.

Insuranshares Corp. v. *Northern Fiscal Corp.*, 35 F. Supp. 22 (DC Pa. 1940) and the other cases relied upon by petitioner are all cases in which the seller of the controlling stock knew of the "looting" or had reason to know at the time he sold his controlling shares at a premium that the purchasers of those shares would dissipate or misappropriate the corporate assets. In *Levy* v. *American Beverage Corporation*, *supra*, 38 N.Y.S. 2d 517, beginning at page 525, the court made this distinction.

In the instant case, Levy did not receive any consideration above the market value for his stock. He did not receive any corporate assets, did not have knowledge or any reason to believe that the purchasers would dissipate or divert corporate assets and, in fact, no such dissipation or diversion occurred.

On the findings of fact the cases relied on by Petitioner are entirely inapplicable.

In finding nothing obnoxious in the sale of the B stock the Court of Appeals followed the general rule as stated in an annotation in 50 ALR 2d 1146-58, entitled, "Dominant shareholder's accountability to minority for profit, bonus, or the like received on sale of stock to outsiders," as follows:

> "A dominant shareholder has as much right as any other shareholder to sell his stock and to sell it at whatever price he may agree upon, without having to account to minority stockholders for any profit or bonus, so long as such profit or bonus is not acquired as a result of a secret agreement as to which he was under a duty to inform the other shareholders, or under such other circumstances as would amount to a breach of his fiduciary duty."

Typical of the cases there reviewed are *Tryon* v. *Smith*, (Ore. 1951) 229 P2d. 251 and *Levy* v. *American Beverage Corp.*, 38 NYS 2d 517 (App. Div. 1942).

III.

There is no showing that the Court of Appeals refrained from considering the law relating to the alleged fiduciary obligation of I. H. Levy in selling his B shares.

The trial court fully and accurately found the facts surrounding the sale of the B shares. The Court of Appeals refused to disturb the facts so found. Petitioner has not pointed out one single error in those findings. On the findings, petitioner had no right to complain of the sale. The law is perfectly clear that the sale was not open to attack. In sustaining defendant's motion to dismiss under Rule 41(b) the trial court held, "that upon the facts and the law the plaintiff has shown no right to relief." The affirming of that judgment by the Court of Appeals involved the same holding. Petitioner has not cited one case which indicates that the holding below was erroneous. The decision of the court below is manifestly correct, and certainly there was no

such deviation from the accepted course of the law as to call for the exercise by this Court of its power of supervision.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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